

- rooftop access is an essential facility for the provision of fixed point-to-point wireless-based local exchange services and that without such access, wireless competitive local exchange carriers ("CLECs") are seriously disadvantaged and in some cases completely precluded from offering competitively-priced services to building tenants and residents;
- the term "rights-of-way" must be interpreted to include rooftop access because rights-of-way generally refer to a right to pass over, under, or through land, buildings and other like property and/or structures;
- the essential nature of rights of way mandates the adoption of a pricing methodology rather than dependence on an ad hoc complaint process; and
- just and reasonable pricing mandates that prices be cost-based and that telecommunications carriers pay no more than their proportionate share of the cost to the utility for maintaining the right-of-way.

WinStar's views were largely shared by Teligent, the only other wireless-based CLEC to file comments in this proceeding.

Likewise, AT&T, KMC Telecommunications, Colorado Springs Utilities, and other utility commenters all supported adoption of a rate methodology or governing principles.

## II. ROOFTOP ACCESS IS INCLUDED WITHIN THE MEANING OF "RIGHTS-OF-WAY" IN SECTION 224.

WinStar agrees with Teligent that rooftop access is an essential facility for the provision of wireless telecommunications.<sup>7</sup> Without the ability to place its antennas on the rooftops of buildings in which customers and potential

---

Telecommunications Services Inside Wiring, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 95-184 ¶ 178 (rel. Oct. 17, 1997) (deferring certain rights-of-way issues to CC Docket Nos. 96-98 and 95-185).

<sup>7</sup> See Teligent Comments at 2-6; WinStar Comments at 5-6.

customers are located, there is literally no way for WinStar or any other wireless-based CLEC to provide its wireless telecommunications services to the building's tenants (especially those interested in accessing wireless telecommunications services).

As a legal matter, there is no barrier to the Commission reaching this conclusion. As demonstrated by both WinStar and Teligent, the rights-of-way in Section 224 include easements and other similar grants of access.<sup>8</sup> More importantly, it is not at all uncommon for easements to provide access to and through structures such as buildings, bridges, etc. The Second Circuit, for example, recently resolved a negligence action involving an easement running through a building including its stairways, lobbies, and vestibules.<sup>9</sup> Likewise, the D.C. Circuit -- in a case involving the scope of a family trust -- noted that a lessor possessed an "easement for parking in an existing garage."<sup>10</sup> Thus, it should be uncontroverted that "rights-of-way" can include rooftop access.

Moreover, as pointed out in WinStar's comments, a utility need not be accessing the rooftop in order for it to be available

---

<sup>8</sup> Id.; Teligent Comments at 6-9.

<sup>9</sup> See Monaghan v. SZS 33 Assocs., 73 F.3d 1276, 1279 (2d Cir. 1996). See also In re Lamont Gear Company, No. 95-17033DAS, 1997 Bankr. LEXIS 979 (Bankr. E.D. Pa. 1997) (tenants of building possessed easement permitting them to access areas belonging to others in order to make use of the building's entrances).

<sup>10</sup> See Burka v. Aetna Life Ins. Co., 56 F.3d 1509, 1511 (D.C. Cir. 1995).

to telecommunications carriers under Section 224.<sup>11</sup> Nothing in Section 224 limits the term "rights-of-way" to those rights-of-way actually being utilized by the utility. Nor has the Commission so limited Section 224. In its Interconnection Order, the Commission expressed its belief that Section 224 obligates utilities to "exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties."<sup>12</sup> Such "new" rights-of-way obviously would not be utilized by the incumbent utility.

**III. THE COMMISSION MUST ADOPT A RATE METHODOLOGY FOR RIGHTS-OF-WAY.**

**A. A Rate Formula Is Necessary To Prevent Anticompetitive Behavior By LECs And Other Utilities Holding Rights-Of-Way.**

The Commission is well aware of the fact that incumbent utilities' control over local exchange facilities gives them the opportunity and incentive to discriminate against their rivals. For example, the Commission has observed that competitors seeking access to LECs' telecommunications facilities are "handicapped by the unique circumstances that their success in competing for BOC customers depends upon the BOCs' cooperation."<sup>13</sup> Such cooperation, the Commission has held, will not occur voluntarily:

---

<sup>11</sup> See WinStar Comments at 9-11.

<sup>12</sup> Interconnection Order, 11 FCC Rcd 15499, ¶ 1181 (1996); see also id. (Section 224(f) requires utilities to exercise their eminent domain powers to "expand an existing right of way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments.").

<sup>13</sup> See Ameritech Michigan Section 271 Order, FCC 97-298, CC Docket No. 97-137 ¶ 17 (rel. August 19, 1997).

in the absence of significant Commission rulemaking and enforcement . . . directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in the local exchange . . . to any discernible degree.<sup>14</sup>

A like conclusion is required with respect to rights-of-way.<sup>15</sup> Absent Commission rulemaking, LECs have little incentive to provide access to their rights-of-way to competitors who will then use the rights-of-way to woo the LECs' customers.<sup>16</sup> This is especially true because -- as acknowledged by Southwestern Bell -- many LECs have obtained their rights-of-way for free.<sup>17</sup> As recognized above, LECs have no motive to pass on such efficiencies (zero cost facilities) to their competitors.<sup>18</sup> Rather, they must be

---

<sup>14</sup> See id. at ¶ 18.

<sup>15</sup> Southwestern Bell has expressly stated that the higher the payment required of telecommunications providers for access to a LEC's rights-of-way, the less likely that tenants will see competitive choices. See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 4 (Oct. 2, 1997).

<sup>16</sup> See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, 95 FCC.2d 1117, 11136 (1983) (BOCs' "control of access to the network [creates] the potential that BOCs could inhibit access [to competitors].").

<sup>17</sup> See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 8 (Oct. 2, 1997) ("[Certain facilities . . . may have been placed by [the] telecommunications utility under an easement or other agreement between the utility and the property owner. Often, those facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider."] (emphasis added)).

<sup>18</sup> See Non-Accounting Safeguards Order, 11 FCC Rcd 21905, 21912 (1996) (noting that BOC has incentive to deprive its rivals of efficiencies that it enjoys); Cable Television and Telecommunications Ass'n of New York Comments at 3 (A Commission policy favoring negotiating of agreements would

compelled to do so by Commission regulation in the form of a rate formula.<sup>19</sup> Such formula comports with the Commission's well-established "philosophy of using regulatory measures to control [] pricing . . . by carriers with control over bottleneck facilities."<sup>20</sup>

**B. LECs' Arguments In Favor Of An Ad Hoc Complaint Process Are Misguided.**

Predictably, all of the commenting BOCs, GTE, and USTA discount the benefits of a rate formula and instead argue that a complaint process is preferable. According to those commenters,

---

permit pole owners to use their vastly greater market power to extract monopoly rents).

<sup>19</sup> The Commission has previously held that regulation is the key to curbing BOCs' incentives to harm rivals. See Non-Accounting Safeguards Order, 11 FCC Rcd at 21915 (regulatory framework is needed to enable service providers to enter each other's markets and compete on an equal footing).

That the Commission's regulatory powers affect BOCs' behavior is exemplified by BellSouth's promise -- in seeking the Commission's permission to provide in-region interLATA services -- to make its rights-of-way available to competitors. See Attachment to Affidavit of Victor E. Jarvis, Access to Poles, Conduits and Rights of Way: Technical Service Description, BellSouth Section 271 Application, CC Docket No. 97-208, App. A, Vol. 3C at 3 (filed Sept. 30, 1997). This promise, however, does not reach any of the other BOCs nor does it guarantee that prices will be fair.

<sup>20</sup> See International Settlements Rates, FCC 97-280, 1997 LEXIS 4397 at ¶ 3 (rel. Aug. 18, 1997). The rate formula along with other rights-of-way guidelines and presumptions should be sufficient to curtail utilities' anticompetitive tendencies; the Commission need not enact comprehensive rules covering every aspect of rights-of-way. See WinStar Petition for Clarification or Reconsideration in CC Docket Nos. 96-98 and 95-185 at 4-5 ("WinStar Reconsideration Petition") (discussing the need for cost-based access to rooftops to be included as part of the Commission's pole attachment regime).

adoption of a rate methodology is unnecessary because: (1) disputes over rates "should be rare";<sup>21</sup> (2) the demand for rights-of-way is small;<sup>22</sup> (3) the Commission is too inexperienced with rights-of-way to properly craft a formula;<sup>23</sup> and (4) rights-of-way implicate too many issues to be captured in a single formula.<sup>24</sup> These arguments are pure sophistry.<sup>25</sup>

The record before the Commission in this and other proceedings should put to rest SBC's claim that disputes over rates for rights-of-way "should be rare."<sup>26</sup> WinStar has repeatedly and continuously encountered difficulties in obtaining rooftop access on fair terms.<sup>27</sup> Such problems will increase exponentially as WinStar and other CLECs -- wireless and wireline -- roll out their services because they will need access to every single building they wish to serve. It also should be remembered

---

<sup>21</sup> See SBC Comments at 21.

<sup>22</sup> See USTA Comments at 15.

<sup>23</sup> See Bell Atlantic Comments at 9; U S West Comments at 11-12; GTE Comments at 14.

<sup>24</sup> See Ameritech Comments at 15; U S West Comments at 12; GTE Comments at 14.

<sup>25</sup> It should go without saying, of course, that a case-by-case complaint process is lengthy, unwieldy, and encourages recalcitrance by LECs and utilities.

<sup>26</sup> See SBC Comments at 35.

<sup>27</sup> See WinStar Petition For Clarification or Reconsideration in CC Docket Nos. 96-98 & 95-185 at 2 (noting LECs' reluctance to permit WinStar to access rooftops at cost-based rates); WinStar Comments in CS Docket No. 95-184 at 7 (rooftop access is not being made available on a reasonable and nondiscriminatory basis).

that WinStar and other CLECs seek access to rights-of-way in order to compete with the incumbent telephone companies. The Commission has long recognized that LECs, especially the BOCs, have little incentive to price fairly or otherwise facilitate entry by competing telecommunications carriers.<sup>28</sup> Consequently, there is no reason to believe that disputes over the proper rate for rights-of-way will be rare.

Likewise, there is no credible basis for USTA's assertion that the demand for rights-of-way is too small to justify creation of a rate methodology.<sup>29</sup> WinStar is in the process of becoming a nationwide wireless CLEC.<sup>30</sup> It has rolled out its switches in eight major markets and expects to be in at least twenty markets by the end of 1998. WinStar presumes that other wireless CLECs have similar plans. As noted, such carriers will need to access LECs' or other utilities' rights-of-way in each building they wish to serve. And, they will not be alone: the comments of both AT&T and KMC Telecommunications illustrate that wireline carriers also will be demanding access to rights-of-

---

<sup>28</sup> See CMRS Safeguards Order, FCC 97-352, 1997 FCC LEXIS 5475 ¶ 55 (rel. Oct. 3, 1997) (LECs have "the incentive and the ability" to hinder competition by denying access to their facilities or setting the rates at excessive levels); Ameritech Michigan Section 271 Order, FCC 97-298, CC Docket No. 97-137 (rel. Aug. 19, 1997) at ¶ 14 ("BOCs, however, have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets.").

<sup>29</sup> See USTA Comments at 15 ("[I]t is not clear that there is sufficient demand for access to rights-of-way that adopting a methodology would be worthwhile.").

<sup>30</sup> It is certified as a CLEC in twenty-nine jurisdictions and as a competitive access provider in thirty-eight.

way.<sup>31</sup> Thus, the Commission should give little heed to LECs' self-serving estimates concerning the demand for rights-of-way.<sup>32</sup>

Equally self-serving is the LECs' assertion that the Commission is too inexperienced with rights-of-way to craft a proper rate formula.<sup>33</sup> That argument is belied entirely by the fact that the Commission often is called upon to craft rules -- including ratemaking -- in areas where it has not previously regulated actively. Prior to the Cable Act of 1992, for example, the Commission had virtually no experience in rate regulation of cable services. Yet, pursuant to that Act's requirements for reasonable rates,<sup>34</sup> the Commission adopted a comprehensive formula for the regulation of cable rates.<sup>35</sup> Apparently, inexperience did not hinder the Commission's cable rate

---

<sup>31</sup> See AT&T Comments at 18-19 (discussing need for rights-of-way methodology); KMC Telecommunications Comments at 9 (rights-of-way may be the only means of access to serve customers in a multi-tenant environment).

<sup>32</sup> GTE's belief (GTE Comments at 35) that rules are unnecessary because attaching carriers have not needed rules for twenty years is specious as telecommunications carriers did not possess access rights under Section 224 prior to the enactment of the 1996 Telecommunications Act. Furthermore, CAPs and CLECs were not in operation for most of the twenty-year period relied on by GTE.

<sup>33</sup> See Bell Atlantic Comments at 9; U S West Comments at 11-12; SBC Comments at 35; GTE Comments at 14; USTA Comments at 14.

<sup>34</sup> See Section 623(a), (b) & (c), 47 U.S.C. § 543(a), (b) & (c).

<sup>35</sup> See First Rate Order, 8 FCC Rcd 5631 (1993).



regulation as its formulaic approach thereafter was upheld by the D.C. Circuit.<sup>36</sup>

Contrary to LECs' suggestions, the need for a rate formula is bolstered by the LECs' own asserted lack of experience with rights-of-way.<sup>37</sup> Assuming that is true -- which is highly problematic<sup>38</sup> -- guidance in the form of a rate formula should ease negotiations between LECs and competitive telecommunications carriers by eliminating this area of possible contention. For this reason, at least one State-owned utility -- which is therefore entirely exempt from Section 224<sup>39</sup> -- "encourages the FCC to adopt a policy for attachment rates for the use of rights-of-way."

The BOCs also attack the creation of a Commission rate formula on the grounds that rights-of-way are too complex to be condensed into a single formula.<sup>40</sup> Not so. Rights-of-way are

---

<sup>36</sup> See Time Warner Ent. Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 911 (1996).

<sup>37</sup> U S West and GTE both argued that they had little experience with rights-of-way and thus adoption of a rate formula would be counterproductive. See U S West Comments at 11-12; GTE Comments at 14.

<sup>38</sup> In contrast to LECs' alleged lack of experience, BellSouth states in its application for Section 271 authority that it has provided "companies with access to . . . rights of way in South Carolina and throughout its region for many years. Such arrangements are 'business as usual.'" See BellSouth Section 271 Application, CC Docket No. 97-208, at 41 (filed Sept. 30, 1997).

<sup>39</sup> Utilities owned by State or local government are outside the reach of Section 224. See 47 U.S.C. § 224(a)(1).

<sup>40</sup> See Ameritech Comments at 15-16; U S West Comments at 12; GTE Comments at 14.

surely susceptible to certain basic principles such as incremental cost. The Commission is well-acquainted with incremental cost formulas and should be able to develop a formula listing those elements which may properly be included. Although rights-of-way may be complex, such complexity merely cautions that exceptions may exist to the rule. That exceptions may exist does not mean that a formula should not be created; rather, it teaches that the Commission should be prepared to grant exceptions or even modify its rules depending on the circumstances. In the cable regulation context, the Commission has taken both actions as opposed to discarding the formula altogether. Given the above, adoption of a rate methodology for rights-of-way is entirely appropriate and good public policy. Further, as demonstrated in Section V, *infra.*, such formula must be nondiscriminatory such that if a LEC pays nothing for access so too should the competitive telecommunications provider.

#### IV. TELECOMMUNICATIONS CARRIERS MAY -- AS THIRD PARTIES -- ACCESS RIGHTS-OF-WAY HELD BY UTILITIES.

Several utilities contend that Section 224 cannot be used to compel them to provide access to their rights-of-way in circumstances where the underlying agreement provides the rights-of-way only for the utility's use<sup>41</sup> or where the utility has no need of the rights-of-way.<sup>42</sup> That view flies in the face of the Interconnection Order which (1) commands utilities to "exercise

---

<sup>41</sup> See Bell Atlantic Comments at 9-10; American Electric Power Comments at 61.

<sup>42</sup> See U S West Comments at 12 n.29.

their powers of eminent domain to establish new rights-of-way for the benefit of third parties"<sup>43</sup> and (2) requires utilities to exercise their eminent domain powers to "expand an existing right of way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments."<sup>44</sup>

Moreover, statutory interpretations by both the Eleventh and Fourth Circuits further weaken the LECs' arguments. For example, the Eleventh Circuit has interpreted the Cable Act's language permitting cable franchisees to use public rights-of-way and easements dedicated for compatible uses as allowing cable operators to "'piggyback' on easements dedicated to electric, gas or other utility transmissions."<sup>45</sup> Likewise, the Fourth Circuit held that:

the use of a wire for the transmission of television signals is substantially compatible with the use given for the transmission of telephonic data and . . . the addition of a television transmission wire, [which accordingly is] indistinguishable in appearance from other communication wires authorized under the grant, does not impose an unnecessary or even increased burden

---

<sup>43</sup> Interconnection Order, 11 FCC Rcd 15499 at ¶ 1181.

<sup>44</sup> Id. With respect to Texas law, Southwestern Bell has noted that a LEC has the right to condemn "[a]ny identifiable interest in real property . . . including conduit and riser space." See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 6 (Oct. 2, 1997).

<sup>45</sup> See Centel Cable Television v. White Development Corp., 902 F.2d 905, 909 (11th Cir. 1990). See also id. at 910 ("It would be inconsistent with the [access] policy of the Cable Act to hold that cable operators cannot piggyback on these rights of access granted to other utilities "where those rights are necessary to full enjoyment of the related easements.").

on the servient estate, [i.e., the underlying property owner].<sup>46</sup>

Although both Circuits have held that the Cable Act does not permit access to private easements, Section 224 is not so limited.<sup>47</sup> Consequently, Centel and C/R TV should apply with full force to both public and private easements under Section 224.<sup>48</sup> In short, third party telecommunications carriers must be provided access to the rights-of-way held by utilities.<sup>49</sup>

V. THE FORMULA FOR RIGHTS-OF-WAY SHOULD BE BASED ON INCREMENTAL COST.

As addressed repeatedly in its initial Comments, WinStar agrees with both AT&T and Teligent that rates for rights-of-way

---

<sup>46</sup> See C/R TV v. Shannondale, 27 F.3d 104, 109 (4th Cir. 1994).

<sup>47</sup> At least two circuit courts have held that the Cable Act's access provisions do not reach private easements. See Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993); Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992). As noted by both WinStar and Teligent, Section 224 applies fully to private easements and rights-of-way. See WinStar Comments at 3-4; Teligent Comments at 6-7. Thus, Media General and Cable Holdings are inapposite here.

<sup>48</sup> The Commission recently held that "we do have the authority in certain instances to review restrictions imposed upon [] use [of rights-of-way.]" See Telecommunications Services Inside Wiring, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 95-184 ¶ 180 (rel. Oct. 17, 1997).

<sup>49</sup> Assuming that a general cost-based rule for rooftop access is adopted, WinStar supports the use of a case-by-case approach for those limited exceptions in which a utility contends that it lacks authority to provide access to its rights-of-way. See WinStar Opposition to Petitions for Reconsideration in CC Docket Nos. 96-98 and 95-185 at 3 (filed Oct. 31, 1996). That is precisely the type of case-by-case review discussed in WinStar's filings in those dockets.

should be based on incremental cost and should be no more than (1) what the utility pays for its access or (2) the proportionate cost to the utility of obtaining access for the requesting telecommunications carrier.<sup>50</sup> According to Southwestern Bell, the incremental cost may well be nothing since many LECs obtained their rights-of-way for free.<sup>51</sup> Furthermore, as appropriately pointed out by AT&T, it should be presumed generally that utilities have already recovered the capital costs of obtaining their rights-of-way.<sup>52</sup> Thus, under both Southwestern Bell's and AT&T's views, access fees would be limited to only those out-of-pocket expenses actually incurred by the utility in making its rights-of-way available, such as clerical costs for recordkeeping, etc.<sup>53</sup> Anything more would be unjust and unreasonable given that the utility either paid nothing or has already recovered its capital costs.

Further support for incremental cost-based rates is found in the Interconnection Order which suggests that rooftop access may be available as an unbundled network element under Section

---

<sup>50</sup> See WinStar Comments at 14-15; AT&T Comments at 17-18; Teligent Comments at 12-15.

<sup>51</sup> See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 8 & 12-13 (Oct. 2, 1997) (stating that "often [LECs] facilities were placed at no charge because the building owner needed telephone service to the building and there was only one provider" and that new providers should be provided access and space "on the same basis as the incumbent") (emphasis added).

<sup>52</sup> See AT&T Comments at 18.

<sup>53</sup> See AT&T Comments at 18-19.

251(c)(6).<sup>54</sup> As a UNE, an incremental cost-based formula -- such as TELRIC -- would be entirely appropriate.

In any event, access rates should be no more than the telecommunications carrier's proportionate share of the cost to the utility of maintaining the rights-of-way. That view has been espoused by Southwestern Bell, which has said that where room is no longer available among all telecommunications utilities in the building, "charges for additional space . . . should be allocated among all telecommunications utilities in the building."<sup>55</sup> Finally, the rate formula must be simple to apply as otherwise it may lead to lengthy debates and complaints over its proper application.<sup>56</sup>

---

<sup>54</sup> See Interconnection Order, 11 FCC Rcd 15499, ¶ 1185.

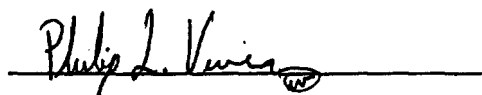
<sup>55</sup> See Southwestern Bell Comments before the Texas PUC, Project No. 18000 at 12 (Oct. 2, 1997).

<sup>56</sup> WinStar, as a facilities-based carrier, strongly disagrees with MCI's view that a rate formula is unnecessary as utilities do not possess market power over rights-of-way. As MCI admits, it has "experienced difficulty" in obtaining access to private rights-of-way. See MCI Comments at 22. Such difficulties demonstrate the utilities' power.

**VI. CONCLUSION.**

WinStar respectfully asks the Commission to carry out Congress' mandate in Section 224 by enacting rules defining rights-of-way broadly and setting forth a cost-based rate formula ensuring just and reasonable access prices to rights-of-way.

Respectfully submitted,



Timothy Graham  
Robert Berger  
Joseph Sandri, Jr.

**WINSTAR COMMUNICATIONS, INC.**  
1146 19th Street, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 833-5678

Philip L. Verveer  
Michael F. Finn

**WILLKIE FARR & GALLAGHER**  
Suite 300  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20036  
(202) 328-8000

Attorneys For WinStar  
Communications, Inc.

October 21, 1997